TERM, 1985

NO. 85-178

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OSCAR de le PUENTE,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

A. CHARLES PERUTO, SR., ESQUIRE

BURTON A. ROSE, ESQUIRE
Counsel for Petitioner

PERUTO, RYAN & VITULLO

Washington West Building
N.E.C. 8th & Locust Streets
Philadelphia, Pa. 19106
(215) 925-5800

QUESTION PRESENTED

I. DID THE COURT OF APPEALS ERR BY APPLYING A HARMLESS ERROR TEST UNDER RULE 11 (h) OF THE RULES OF CRIMINAL PROCEDURE TO THE FAILURE OF THE DISTRICT COURT IN A GUILTY PLEA COLLOQUY TO COMPLY WITH THE MANDATORY ADVICE REQUIREMENT OF RULE 11 (e) (2) ?

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IN THE SUPREME COURT OF THE UNITED STATES

OSCAR de le PUENTE,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE

THIRD CIRCUIT

OSCAR de le Puente, the Petitioner above named, respectfully prays this Honorable court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit entered in this matter on February 20, 1985, (Application for Reargument En Banc refused March 18, 1985). See exhibit "B" attached.

JURISDICTION

This Court has proper jurisdiction under 28 U.S.C. Section 1254 to review Judgements of the United States Court of Appeals for the Third Circuit. Please note that the Court granted an extension of time to file the Petition for a Writ of Certiorari in this case until June 16,1985 by Order dated May 20,1985 (attached as Exhibit "A".

RULE OF CRIMINAL PROCEDURE INVOLVED

At issue in this case is the interpretation of Rule 11(e) (2) Rule 11(h) of the Federal Rules of Criminal Precedure, which states the following:

> Rule 11(e) (2) (in pertinent part): If the agreement is of the type specified in subdivision (e) (1) (B) the court shall advise the Defendant that if the court does not accept a recommendation or request the Defendant nevertheless has no right to withdraw his plea.
>
> Rule 11(h): Any variance from the procedures required by this Rule which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

The Petitioner in this matter is Oscar de le Puente, a prisoner at the Federal Correctional Institute at Sandstone, Minnesota. The Petitioner was arrested on or about March 7, 1984 and charged with Possession of Cocaine with Intent to Distribute. He was indicted in the United States District Court in the Eastern District of Pennsylvania as per Criminal Action No. 84-00113.

The Petitioner was represented by Oscar Rodriguez, Esquire, of Florida, when the matter appeared before the United States District Court, the Honorable Louis C. Bechtle. As a result of certain pretrial negotiations, the Petitioner entered into a plea of guilty as to counts III and IV of this Indictment; in exchange for the plea, the Government agreed to recommend to Judge Bechtle that Petitioner's term of imprisonment not exceed five (5) years. The guilty plea occured before Judge Bechtle on May 17,1984.

On June 20, 1984, Judge Bechtle disregarded the Government's recommendation and imposed a total term of confinement of twenty (20) years imprisonment upon the Petitioner.

A timely Notice of Appeal was undertaken by present counsel to the United States Court of Appeals for the Third Circuit. In that Appeal, the Petitioner contended that he should be permitted to plead anew due to the failure of the District Court to comply with Rule 11(e)(2) in that the Petitioner was not advised by Judge Bechtle prior to the entry of the guilty plea that should Judge Bechtle not accept the Government's Recommendation, the Petitioner would have no right to withdraw his plea.

In disposing of that contention on direct appeal, the United States Court of Appeals for the Third Circuit issued an Opinion on February 20, 1985, finding that Judge Bechtle's failure to comply with Rule 11(e) (2) was error, but that same was harmless error under Rule 11 (h).

A subsequent timely petition for Reargument

En Banc was refused by the United States Court of Appeals for the Third Circuit.

On May 20, 1985, this Court granted an Application on behalf of Petitioner to extend the time for filing of the present Petition to June 16, 1985.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD HOLD THAT THE FAILURE OF THE DISTRICT COURT TO ADDRESS THE CONCERNS MANDATED BY RULE 11(e) (2) IN A GUILTY PLEA COLLOQUY REQUIRES THE GRANT OF AN OPPORTUNITY TO PLEAD ANEW, NOTWITHSTANDING ANY HARMLESS ERROR CONTE TION UNDER RULE 11(h).

All parties in this case agree that the District Court in this case at the time of the Petitioner's guilty plea failed to comply with the requirement of Rule 11(e) (2) that the Petitioner be advised that should the District Court not accept the Government's recommendation (which it did not), the accused would have no right to withdraw his plea. In denying relief, the United States Court of Appeals for the Third Circuit held that this omission was harmless error under Rule 11(h). With this result the Petitioner respectfully disagrees and prays that this Honorable Court vacate the decision of the United States Court of Appeals for the Third Circuit.

The Petitioner respectfully suggests that the interpretation of Rule 11(e) (2) provided by the Court of Appeals would be to render its meaning null and void since a complete failure by the District Court to address the concerns found in Rule 11(e) (2) is seen by the Court of Appeals to be harmless error.

The Court of Appeals held that the extensive advice given to the accused in areas of Rule 11 not related to section 11(e) (2) is sufficient to compensate for the omission of the mandatory terms of Rule 11(e) (2). Petitioner respectfully suggests that such a result would be to render the language of Rule 11(e) (2) as mere surplusage.

The result reached by the United States Court of Appeals for the Third Circuit is not consistent with the results reached in other Circuits on the same question. See United States vs. Corbett, 742 F. 2d 173 (5th Circuit 1984). Also see United States vs. Burruezo, 704 F. 2d 33 (2nd Circuit 1983); United States vs. Stanton, 703 F. 2d 974 (6th Circuit 1983);

and United States vs. Balckner, 721 F. 2d 703 (10th Circuit 1983). In these cases, the Defendant was permitted to plead anew where the District Court failed to provide the mandatory advice required by Rule 11(e) (2).

These cases stand for the proposition that the failure of the District Court to comply with the mandatory language of Rule 11(e) (2) cannot be saved by referring to other areas of Rule 11 wherein compliance may be found, including language that the District Court is not bound by the Government's recommendation.

In Corbett, supra, it was specifically held that where there is an entire failure to address an area of core concern under Rule 11, the harmless error rule will not apply, noting that said rule is designed to forgive "inadequate addresses, not entire failures" to deal with areas of core concern under Rule 11. Petitioner certainly agrees that the requirements of Rule 11(e) (2) relating to the awareness of the accused of the direct consequences of his quilty plea are such as would

constitute an area of core concern under Rule 11.

Furthermore, the Comment to Rule 11(h) specifically states that "the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited"."An example of such a technical violation can be found as stated in Corbett, supra, where the accused clearly indicated his awareness of that element. Such is not the case in the instant matter.

Since this is a direct appeal and not a collateral attack, the standard of review is more liberal as to this Petitioner's claim of a Rule 11 violation. United States vs. Timmreck 441 U.S. 780 (1984). The position of the United States Court of Appeals for the Third Circuit that the Petitioner must establish "some realistic likelihood that he labored under the misapprehension that his plea could be withdrawn" unfairly shifts the burden of proof in a harmless error context upon the Petitioner, which is inconsistent with Chapman

vs. California, 386 U.S. 18 (1967) and related cases. The burden of persuasion should be exclusively upon the Government to prove that the error in question is harmless beyond a reasonable doubt, since the policies underlying Rule 11 reflect concerns of a constitutional nature. In this particular situation, the Government has not met that burden.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that this Honorable Court vacate the decision of the United States Court of Appeals for the Third Circuit in this matter since the same is not in line with an appropriate construction of Rule 11 (h), as the Rule has been viewed by other Courts of Appeal, and grant the Petitioner an opportunity to plead anew.

Respectfully submitted,

A. Charles Peruto

A. CHARLES PERUTO, SR., ESQUIRE

Burton A. Rose

BURTON A. ROSE, ESQUIRE
Counsel for Petitioner

Certificate of Service

I, BURTON A. ROSE, Esquire, being duly sworn according to law, depose and say that a true and correct copy of the within Petition for a Writ of Certiorari has been served upon Ronald K. Noble, Esquire, Assistant United States Attorney, 3310 United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106 and Office of the Soliciter General of the United States, Department of Justice, Washington, D.C. 20543.

Burton A. Rose

BURTON A. ROSE, Esquire
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

No. A-866

OSCAR de le PUENTE,
Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner~~xxx~~, It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 16, 1985.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 20th

day of May, 1985.

EXHIBIT "A"

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1384

UNITED STATES OF AMERICA

v.

OSCAR de le PUENTE

Appellant

(D.C. Crim. No. 84-00113-01)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
February 5, 1985
Before: SEITZ, GIBBONS and SLOVITER,
Circuit Judges

(Opinion Filed: February 20, 1985)

A. CHARLES PERUTO, ESQ.
BURTON A. ROSE, ESQ.
Peruto, Ryan & Vitullo
Washington West Building
N.E.C. 8th & Locust Streets
Philadelphia, PA 19106

Attorneys for Appellant

EDWARD S. G. DENNIS, JR.
United States Attorney

EXHIBIT "3"

WALTER S. BATTY, JR.
Assistant U.S. Attorney
Chief of Appeals

RONALD K. NOBLE
Assistant U.S. Attorney

3310 United States Courthouse
601 Market Street
Philadelphia, PA 19106

Attorneys for Appellee

OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

Oscar de le Puente appeals from a sentence imposed following a guilty plea. He contends that he should be permitted to withdraw his guilty plea and plead anew, because the trial court, when it accepted the guilty plea, did not comply fully with Fed. R. Crim. P. 11(e). We affirm.

Mr. de le Puente was charged in an indictment with two counts of possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (1982), and one count of conspiracy to distribute in violation of 21 U.S.C. § 846 (1982). Pursuant to plea negotiations he agreed to plead guilty to two counts of the indictment, while the government agreed that it would dismiss one count and would recommend to the court a sentence of incarceration not to exceed five years.

On May 14, 1984, de le Puente appeared before the trial court, which accepted his guilty plea to two counts. Before accepting that plea the court advised him, through an interpreter, as follows:

THE COURT: What I am telling you, Mr. de le

Puente, is that the maximum sentence could be imposed. The minimum sentence that could be imposed would be a term of probation. So the sentence has to be, under the law, somewhere between the probationary term and the maximum term I mentioned.

Now, the United States Attorney has agreed to recommend to the Court that the sentence that should be imposed within this range, if it's a jail term, it should not exceed a total of five years.

What you have to understand now is that the Court, while it will listen to that recommendation and consider the Government's recommendation very important, the Court is not bound by that recommendation. That is, the Court could impose a sentence that would be less than that or more than that, within the range that I have outlined.

Do you understand that?

THE INTERPRETER: Yes.

THE COURT: So if you plead guilty, it will be on the basis that the Court will receive the recommendation of the Government and will hear from your attorney and will hear from you, and the Court will then impose a sentence in the range between probation and up to a maximum of 30 years in prison together with a fine of up to $50,000 or both.

Is there any question about that?

Do you have any questions, Mr. de [el] Puente about that?

THE INTERPRETER: No.

Fed. R. Crim. P. 11(e) governs plea agreement procedures. Rule 11(e)(1) authorizes discussions

intended to reach an agreement that when the defendant enters a guilty plea the attorney for the government will.

> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case.

The parties agree that this plea agreement involved both an agreement to dismiss one charge, and an agreement to recommend a particular sentence.

Rule 11(e)(2) requires that if a plea agreement is reached by the parties, the court shall on the record require its disclosure in open court. That rule also provides:

> If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

The parties agree that the court adequately disclosed on the record in open court the terms of the plea agreement. But as the quoted colloquy makes plain, de le Puente was not advised that if the court did not accept the government's recommendation he nevertheless could not withdraw his plea. The court did not accept the recommendation, but sentenced de le Puente to 20 years in jail.

Prior to August 1, 1983, it was an open question in this circuit whether, on direct appeal, a harmless error

standard would be applied with respect to technical failures to comply with the notice requirements of Rule 11. *See United States v. Carter*, 619 F.2d 293, 294 (3d Cir. 1980). On that date Fed. R. Crim. P. 11(h) became effective. It provides that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." The amended rule resolves the open question. We must decide whether the omission of advice to de le Puente that if the court did not accept the government's recommendation he was nevertheless bound by his plea, may be regarded as harmless error.

The Rule 11 colloquy was adequate in all other respects. All the admonitions required by Rule 11(c) were delivered. The court made the inquiry into voluntariness required by Rule 4(d). The terms of the plea agreement were accurately set forth on the record. In these circumstances we believe that the omission of the statement required by Rule 11(e)(2) must be deemed harmless error unless there is some realistic likelihood that de le Puente labored under the misapprehension that his plea could be withdrawn. There is no such likelihood, in view of the extensive advice which he was given pursuant to Rule 11(c).

Mr. de le Puente pointed out that in *United States v. Iaquinta*, 719 F.2d 83, 85 (4th Cir. 1983), the court did not make a harmless error analysis with respect to the same omission as in this case. The *Iaquinta* court did not refer to Rule 11(h), although this amendment was in effect at the time of the decision, probably because it was not in effect on the date of the Rule 11 proceeding in the district court.

The better practice unquestionably is to comply literally and completely with every requirement of Rule 11. Rule 11(h), however, requires a harmless error standard of review. We cannot hold that the omission

relied upon was other than harmless. *Cf. United States v. Timmreck*, 441 U.S. 780 (1979).

The judgment appealed from will, therefore, be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit